old conception of property rights may seem, courts have wisely held that they shall not be changed by implications not strictly necessary. Of course the imposition of a tax does not directly involve unsettling titles, but an unsystematic breaking away from the theories of seizin and the nature of estates must eventually have that result.

IS THE LIABILITY OF THE MAKER OF A DOMICILED NOTE PRIMARY OR SECONDARY? — The effect of the failure of a bank upon the relation of the parties to a promissory note made payable at the bank has been determined by the Court of Appeals of New York in the recent case of *Baldwin's Bank of Penn Yan* v. *Smith*, 109 N. E. 138.[1] The holder of a note sent it by post for collection to the bank at which it was made payable, and did not make inquiries, nor hear from the bank, for seven days, at which time the bank failed. The maker had sufficient funds with the bank and had given it orders to pay the note when he learned that it was there. The bank promised to do so, but did nothing in furtherance of the order. It was held that the holder could not recover from the maker. The decision was rested upon the ground of payment, or, in the alternative, negligence of the bank as the holder's agent in not procuring payment.

In so far as this result is based upon actual payment, it cannot be supported. Undoubtedly the courts have gone to great lengths to spell out a payment where negotiable paper has been sent to a bank which has funds on hand to pay it. Thus the transfer of credits upon the books of the bank has been held sufficient.[2] And there is a case in Massachusetts to the effect that the cancellation of the note, the preparation of a cashier's check to be remitted to the holder, and the making of a memorandum on a pad, to be entered upon the permanent books at the end of the day, constituted a payment.[3] The validity of this decision may very well be doubted, for although the maker had been deprived of control over his account to the extent of the amount of the note, there had been no step toward giving anything to the holder. And where, as in the principal case, there has not even been an act depriving the maker of control over his deposit, it is impossible to find any payment.[4]

Regarding the second contention of the court, it is futile to talk of negligence of the holder in sending the note by mail, or of the negli-

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81 N. Y. Misc. 86, 142 N. Y. Supp. 1064; *In re* Thompson's Estate, 130 N. Y. Supp. 970. It has been held that when a joint tenant takes by survivorship no tax lies. *In re* Heiser's Estate, 85 N. Y. Misc. 271, 147 N. Y. Supp. 557. Tenancy by the entirety is then an *a fortiori* case, for joint tenants are seized *per my et per tout*. BL. BK. II, 182. Minor states that this maxim should be *per tout et per mie*. 2 MINOR, INST., 4 ed., 470. *Cf.* "*Quilibet totum totum tenet et nihil tenet; scilicet, totum in communi, et nihil separatim per se.*" LEWIS' BL. BK. II, 182 n. (*j*).

[1] See RECENT CASES, p. 217.

[2] Pratt *v.* Foote, 9 N. Y. 463; Daniel *v.* St. Louis National Bank, 67 Ark. 223, 54 S. W. 214.

[3] Nineteenth Ward Bank *v.* First National Bank, 184 Mass. 49, 67 N. E. 670.

[4] Sutherland *v.* First National Bank, 31 Mich. 230. *Cf.* Moore *v.* Norman, 52 Minn. 83, 53 N. W. 809.

gence of the bank being imputed to the holder on some theory of agency, if the maker of a domiciled note is primarily liable. A debtor cannot complain that his creditor is careless in pursuit. In the absence of payment, the maker's defense must be that his liability is conditional and not primary. At common law this question has caused considerable confusion. In England, presentment of a domiciled note at the designated place is necessary as a condition precedent to suit against the maker, but failure to present at the day of maturity seems only to affect the question of interest and costs.[5] In America, before the Negotiable Instruments Law, no presentment was necessary as a condition to bringing suit against the maker, though, as in England, the maker could set up as a valid tender the fact that he had funds at the bank at the day of maturity.[6] If the holder did thus present the note, the majority view was that the bank might pay it out of funds of the maker on deposit,[7] though this was vigorously disputed.[8] And there seem to have been but two isolated and much criticised decisions which denied the holder a recovery where his neglect to present resulted in a loss to the maker due to failure of the bank.[9]

However, the situation has been materially changed by the Negotiable Instruments Law. At common law the bank had at most but a bare authority to pay a note domiciled there. Now, by express provision, such an instrument is equivalent to an order on the bank to pay the same.[10] This is in effect the creation of negotiable paper similar to a check, differing only in that it is payable at a future date. And there is not even this distinction when the note is payable on demand. In both cases the business understanding is that the debtor will have sufficient funds at the bank, and it is the duty of the bank to apply such funds to payment of the instrument. It might well be urged, therefore, that the statute has, in substantial effect, put the maker of a domiciled note in a position of secondary liability similar to that of the drawer of a check. It then becomes unnecessary to determine whether the holder in the principal case was negligent in sending the note to the domiciled bank for collection, or whether the bank was made the agent of the holder.[11] Treating the mailing of the note to the bank as a sufficient

[5] Dickinson *v.* Bowes, 16 East 110; Sands *v.* Clarke, 8 C. B. 751. *Contra*, Nichols *v.* Bowes, 2 Campb. 498. *Cf.* Rowe *v.* Young, 2 Brod. & B. 165.

[6] Wallace *v.* McConnell, 13 Pet. (U. S.) 136.

[7] Bedford Bank *v.* Acoam, 125 Ind. 584, 25 N. E. 713; Kymer *v.* Laurie, 18 L. J. Q. B. 218.

[8] Wood & Co. *v.* Merchants Savings, etc. Co., 41 Ill. 267; Grissom *v.* Commercial National Bank, 87 Tenn. 350, 10 S. W. 774.

[9] Lazier *v.* Horan, 55 Ia. 75, 7 N. W. 457. (This case was thought to hold that there was a payment, and was in terms overruled in Bank of Montreal *v.* Ingerson, 105 Ia. 349, 75 N. W. 351); Bank of Charleston, etc. *v.* Zorn, 14 S. C. 444. See STORY, PROMISSORY NOTES, § 228. For a careful criticism of these cases, see Adams *v.* Hackensack, 44 N. J. L. 638. See also Williamsport Gas Co. *v.* Pinkerton, 95 Pa. St. 62.

[10] See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, § 87. "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."

[11] That such action is negligence, see Pinkney *v.* Kanawha Valley Bank, 68 W. Va. 254, 69 S. E. 1012, and cases cited.

For a decision based upon agency of the bank for the holder, see Farwell *v.* Curtis, 7 Biss. 160.

presentment for payment, justified by reasonable business custom,[12] the holder should still not be allowed to recover. Failure by the bank to remit to the holder within a reasonable time was sufficient to indicate that the note had been dishonored,[13] and the holder having failed to give seasonable notice of dishonor,[14] the defendant as a party secondarily liable was thereby discharged, just as if he were the drawer of a check.[15] It is to be hoped that this construction of the Negotiable Instruments Law, desirable as it is from a commercial viewpoint, may find favor with the courts.[16]

THE WRIT OF *NE EXEAT*. — A novel application of the writ of *ne exeat*, which has lately been made by the Court of Chancery of New Jersey, gives proof of an encouraging tendency of courts of equity to extend old remedies to new situations, whenever necessary to prevent a failure of justice. The writ was issued in aid of a decree awarding the custody of a minor child to the mother and ordering her to allow the father to have access to the child at a specified place in New Jersey. *Palmer* v. *Palmer*, 95 Atl. 241 (N. J.).[1]

The writ of *ne exeat*[2] is an equitable remedy in the nature of bail at common law.[3] It is directed to the sheriff, commanding him to commit the party to prison until he gives security not to leave the jurisdiction without permission of the court.[4] Its prototype appears to have been a writ *de securitate invenienda*,[5] designed to prevent too close relations between the clerical body of England and the Papal See,[6] by forbidding clergymen to depart from the realm without the King's license. The writ of *ne exeat* was first used in England some time between the reign of John and that of Edward I, as a high prerogative writ, founded on the duty of the subject to defend the King and his realm.[7] In view of the political nature of the original writ, it is quite natural that the courts have been inclined to limit its application as a purely civil remedy.[8] As early as the reign of Queen Elizabeth, how-

[12] Prideaux *v.* Criddle, L. R. 4 Q. B. 455; Heywood *v.* Pickering, L. R. 9 Q. B. 428. See Indig *v.* National City Bank, 80 N. Y. 100, 106.

[13] Bailey *v.* Bodenham, 10 L. T. N. S. 422, 423.

[14] See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, §§ 102, 104.

[15] See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, § 89. Bacigalupo *v.* Parrilli, 112 N. Y. Supp. 1040; Kuflick *v.* Glasser, 114 N. Y. Supp. 870.

[16] The court in the principal case seems to have thought of this interpretation, but did not rely upon it. See 109 N. E. 138, 139.

[1] For a more complete statement of this case, see RECENT CASES, p. 222.

[2] In England, called *ne exeat regno*. See STORY, EQUITY JURISPRUDENCE, 13 ed., § 1465. In the United States, called *ne exeat republica*. See 1 WHITEHOUSE, EQUITY PRACTICE, § 428.

[3] See Haffey *v.* Haffey, 14 Ves. Jr. 261; Mitchell *v.* Bunch, 2 Paige (N. Y.) 606.

[4] For form of writ, see Rice *v.* Hale, 59 Mass. 238, 242; 3 DANIELL, CHAN. PLEAD. AND PRAC., 2328.

[5] For form of this writ see BEAMES, NE EXEAT, Appendix I.

[6] See BEAMES, NE EXEAT, 9, 11; 3 CO. INST., ch. 84, p. 179.

[7] 2 BRITTON, 283; see FITZHERBERT, NATURA BREVIUM, 85.

[8] See Tomlinson *v.* Harrison, 8 Ves. Jr. 32; Whitehouse *v.* Partridge, 3 Swanst. 365, 379; Dick *v.* Swinton, 1 Ves. & Bea. 371, 373.